

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MANTA MANAGEMENT
CORPORATION,

Cross-complainant and Respondent,

v.

CITY OF SAN BERNARDINO,

Cross-defendant and Appellant.

E036942

(Super.Ct.No. SCVSS18157)

**ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]
AND DENIAL OF PETITION
FOR REHEARING**

The petition for rehearing is denied. The opinion filed in this matter on May 11, 2006, is modified as follows:

1. On page 1, in the attorney listing for Cross-complainant and Respondent, the “J.” in Roger J. Diamond is deleted and replaced with the word “Jon.”

2. On page 5, the first sentence of the last paragraph is modified to read:

Following a lengthy nonjury trial, the trial court ruled that the initial ordinance was constitutionally invalid because it neither served a substantial governmental interest nor allowed for reasonable alternative avenues of communication.

3. On page 18, the last paragraph is deleted and replaced with the following two paragraphs:

Finally, the city argues that under federal law, there is “good cause” for denying damages based on Manta’s failure to oppose the injunction on the grounds on which it ultimately prevailed at trial, i.e., that the ordinance violated Manta’s civil rights. It cites *Coyne-Delaney, supra*, 717 F.2d 385 and *Page Communications Engineers, Inc. v. Froehlke* (D.C.Cir. 1973) 475 F.2d 994. Both cases hold that in an action to recover on an injunction bond, the trial court has the discretion to deny or limit recovery based on equitable considerations. (*Coyne-Delaney, supra*, at pp. 381-383; *Page Communications Engineers, Inc. v. Froehlke, supra*, at p. 997.)

In our tentative opinion, we pointed out that the city did not provide any citation to the record to demonstrate that the issue was raised below, and we therefore declined to address it. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) Prior to oral argument, the city submitted a document which included citations to the record demonstrating that it did raise the issue during the bench trial on liability under section 1983. The trial court did not rule directly on that contention, but rejected, as we have done, the city’s argument that the section 1983 action was subject to the rules applicable to claims for damages resulting from the erroneous issuance of an injunction. We can infer, therefore, that the court concluded that the rule the city now asserts does not apply to Manta’s claim under section 1983. We agree, for the reasons stated above, i.e., that because Manta’s section 1983 claim is a tort action, it is not subject to the rules which apply to actions for erroneously issued injunctions.

4. On page 19, in the second paragraph, first sentence, the words “commencement of the trial on damages” are deleted and replaced with “time it reopened.”

Except for these modifications, the opinion remains unchanged. These modifications do not effect a change in the judgment.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.